ISLANDER EAST PIPELINE COMPANY, L.L.C.
454 East Main Street Branford, CT 06405
(203) 488-1800 *phone* • (800) 516-9997 *toll-free* • (203) 488-1490 *fax*

Islander East Pipeline Company

May 27, 2003

Mr. Charles H. Evans
Director
Office of Long Island Sound Programs
State of Connecticut
Department of Environmental Protection
79 Elm Street
Hartford, Connecticut 06106-5127

Re: Islander East Pipeline Project -- Water Quality Certificate App. #200300937

Dear Mr. Evans:

We are in receipt of your letter dated May 5, 2003. Your letter comments on the completeness of the application filed by Islander East Pipeline Company, LLC ("Islander East") for a water quality certification pursuant to section 401 of the Federal Water Pollution Control Act ("Water Quality Certification"). It also addresses Islander East's request for a determination that the Islander East pipeline project is consistent with Connecticut's coastal zone management plans ("CZM Determination") and Islander East's pending application for a Tidal Wetlands and Structures & Dredging Permit ("TWSD Permit"). You refer to these three matters as if they were part of a single process. The three applications, however, represent three legally distinct matters and, in Islander East's view, cannot appropriately be treated on a consolidated basis for all purposes. Islander East's response to your letter with respect to each of the three matters is set forth herein.

CZM Determination: As you are aware, the CZM Determination is currently the subject of a proceeding pending before the U.S. Secretary of Commerce ("Secretary"). On May 15, 2003, Islander East filed with the Secretary a request that the proceeding be remanded to the Connecticut Department of Environmental Protection ("DEP") for a period to end no later than July 31, 2003. The request for remand is predicated on the fact that Islander East has proposed additional mitigation measures and provided supplemental data which Islander East believes should be considered by the DEP and made a part of the decisional record. The request for remand is intended to facilitate the resolution of outstanding issues with the DEP, so that the Secretary is not burdened with the appeal. By letter dated May 23, 2003, the DEP notified NOAA that it did not object to Islander East's request. On remand, further processing of Islander East's application by DEP will be governed by applicable federal law and the federal regulations set forth at 15 C.F.R §930.129 which require, *inter alia,* that the Secretary, in remanding an appeal, shall "determine a time period for the remand to the State not to exceed three months." Islander East urges the DEP to issue a coastal zone

consistency determination within the time period established by the Secretary in the remand order.

Islander East is aware that the Connecticut Legislature has pending before it a proposal to extend beyond June 3, 2003 the current moratorium ("Moratorium") on issuance of permits for construction in Long Island Sound. Even if the Moratorium is extended, it is Islander East's view that the DEP must still act on Islander East's application within the period established by the Secretary, because such action is required by the federal law from which the DEP's authority to act is derived, and no state moratorium can vary that federal requirement.

Water Quality Certification At the outset, we would remind you that Islander East's Section 401 application has been pending with the DEP since February 13, 2002, well over a year. On March 13, 2003, after consultation with the DEP Staff, Islander East refiled its Section 401 application in order to accommodate DEP's request for additional time to consider modified offshore construction techniques developed after detailed discussions with DEP Staff. Your May 5 letter now seeks to continue the process of requiring new information and new proposals from Islander East, in complete disregard of the processes which have been under way at the DEP for well over a year and contrary to the understanding which led to the refiling on March 13, 2003.

Your May 5 letter treats the Section 401 Water Quality Certification as if it is a siting process, which it clearly is not. Indeed, your statement that Islander East must, as part of that process, "fully evaluate alternatives and provide a compelling demonstration that there are no feasible alignments that could further minimize adverse impacts" because "the Department can only authorize that alternative with the least impact" is completely at odds with the law.

The Clean Water Act "establishes distinct roles for the Federal and State Governments."[1] "Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded. The State can only ensure that the project complies with 'any applicable effluent limitations and other limitations, under [33 U.S.C. §§ 1311, 1312]' or certain other provisions of the Act, 'and with any other appropriate requirement of State law.'"[2] Thus, the purpose of the Water Quality Certification is to permit the State, acting reasonably, to determine whether a

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[1] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).

[2] *Id.* at 712 (citing 33 U.S.C. § 1341(d)). *See Summit Hydropower v. Comm'r of Envtl. Prot., et al.*, 7 Conn. 95 (Conn. Super. Ct. 1992), *rev'd on other grounds*, 226 Conn. 792, 629 A.2d 367 (1993). In PUD No. 1, the Court acknowledged that § 401(d)'s reference to other "appropriate requirement of State law" would cover a state's imposition of limitations to ensure compliance with state water quality standards, but refused to speculate "on what additional state laws, if any, might be incorporated by this language." *PUD No. 1*, 511 U.S. at 713.

"discharge" resulting from a federally licensed activity complies with State water quality standards.

Here, the "discharge" to be evaluated by the state is the discharge that will result from the construction and operation of the Islander East pipeline *as authorized by FERC, utilizing the route certificated by FERC.* The federal delegation of authority under the Clean Water Act does not include any authorization to conduct a project alternative analysis. Further, while the state is authorized to condition a certification upon the applicant's compliance with an "appropriate requirement of State law," requiring the use of a different route than that certified by FERC could not possibly be an "appropriate" State requirement. The FERC has exclusive jurisdiction over these matters to the exclusion of the states.[3] The State's desire to evaluate alternatives to the Islander East pipeline project which would materially deviate from the FERC-certificated route clearly exceeds the authority available to it under Section 401. In short, the Section 401 process is not a forum for the state to revisit the "extensive analysis of the project as required by the [NGA] and other statutes"[4] that was conducted by FERC. As explained in the FERC Letter, FERC's analysis of the Islander East project:

> included an exhaustive study of the project's environmental impacts as required by the National Environmental Policy Act and other environmental statutes; this analysis focused in particular on the impact the proposed project will have on Long Island Sound . . this analysis, which was subject to review and comment by local, state and federal agencies, the public and other entities, concluded that the project would have acceptable environmental impacts, including the crossing in Long Island Sound.
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> [t]he environmental impacts associated with the Sound water crossing have been fully and carefully reviewed by the Commission in a public process and have been found to be acceptable. While we are mindful that the development and construction of pipeline facilities present significant environmental challenges, the Commission must balance these considerations with its overriding responsibility under the NGA to ensure the timely development of an adequate, reliable energy infrastructure.
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> The project will contribute to Long Island's energy security, a particularly vital national consideration at the present time. The Islander East Project will also increase the diversity of available pipeline transportation options and access to supply sources and

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[3] *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply Corp. v. Pub. Serv. Comm'n.*, 894 F.2d 571 (2nd Cir. 1990), *cert. denied*, 110 S. Ct. 3240 (1990).

[4] *Letter from Pat Wood, III, Chairman of the FERC, to Mr. Scott Gudes, Deputy Under Secretary for Oceans and Atmosphere, United States Department of Commerce, March 11, 2003 ("FERC Letter").*

> introduce pipeline-to-pipeline competition into eastern Long Island for the first time. Moreover, the pipeline will increase overall regional infrastructure reliability and offer an additional source of outage protection to an area which is currently served mainly by one source of supply.[5]

FERC analyzed, and rejected, the alternatives on which the DEP now seeks to focus. FERC explained that:

> In certificate proceedings, the Commission's primary responsibility under the NGA is to determine if the proposed facilities are required by the public convenience and necessity. The term public convenience and necessity connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. The Commission's obligation is to weigh all relevant factors in exercising its responsibilities under the NGA. A flat rule making one factor dispositive in the certificate decision is contrary to the Commission's responsibility to consider and balance all relevant factors. Thus, although the final EIS finds, solely from an environmental standpoint, that the ELI System Alternative is the preferred environmental alternative to Islander East's proposal, that factor is not the end of our inquiry into the public convenience and necessity.
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> The proposed Islander East and Algonquin Projects increase the flexibility and reliability of the interstate pipeline grid by offering greater access to gas supply sources with increased availability of gas for anticipated electric generation projects. Further, it will introduce pipeline-to-pipeline competition to Eastern Long Island markets. In approving the proposed pipeline, the Commission also reviewed the precedent agreements filed by Islander East and various market studies to determine that there was sufficient long and short-term market demand to support the proposed project. Additionally, . . . the Commission determined that the proposed Islander East Project is consistent with the Policy Statement's criteria.
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> The Commission also reviewed the filings made by Islander East's proposed customers and the New York PSC emphasizing the need for a totally separate sound crossing to provide contingency protection for both gas and electric systems against a total loss of supply if damage were to occur to the Iroquois line.

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[5] *Id.*

> Accordingly, after taking the hard look required by NEPA, the Commission concluded, under the NGA, that the other values of the proposed project outweighed what the final EIS described as the project's limited, but acceptable, environmental costs. As such, it determined that, under the NGA, it was required by the public convenience and necessity to approve the Islander East Project.[6]

Thus, the FERC has already conducted the analysis that the State seeks to conduct under the auspices of Section 401. A further, duplicative review by the State is both outside the State's authority under Section 401 and is clearly preempted by the NGA.[7] Moreover, FERC notified the DEP and twelve of its administrative subdivisions, including the Office of Long Island Sound Programs, of the preparation of the DEIS and the FEIS for this project, and invited them to comment on those documents and to intervene in the underlying FERC certificate proceeding.[8] The DEIS and FEIS specifically addressed the issues of alternative projects and alignments, and, as part of its certificate order, FERC reviewed and considered all alternative projects and alignments presented to it and approved the current pipeline alignment for the project. The DEP did not timely intervene, and FERC denied the DEP's request for late intervention on a petition for rehearing. FERC approval and denial of rehearing on these issues, as well as others that could or should have been raised before FERC is

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[6] *Islander East Pipeline Co., et al.*, 102 FERC ¶61,054 (2003) at ¶5.

[7] *See Niagara Mohawk Power Corp. v. N.Y. Dep't of Envtl. Conservation*, 592 N.Y.S.2d 141 (App. Div.) (allowing state laws to be conditioned on compliance with other "appropriate" state laws begs the question as to which laws are "appropriate"; here the agency seeks to consider provisions of state law that address the very matters reserved by the Federal Power Act for determination at the federal level, *e.g.*, dam safety, general balancing of economic and other concerns), *aff'd*, 624 N.E.2d 146, 147, 150 (N.Y. 1993) (New York Department of Environmental Conservation's effort to broaden the scope of its review under the Clean Water Act to include aspects of ECL article 15 is unfounded), *cert. denied*, 511 U.S. 1141 (1994); *Matter of the Power Auth. of New York v. Williams*, 457 N.E.2d 726, 730 (N.Y. 1983) (state agency cannot balance the need for a project against its environmental impact); *Matter of de Rham v. Diamond*, 295 N.E.2d 763, 768 (N.Y. 1973) (state agency has neither the authority nor duty to delve into many other issues that had been investigated and decided by the Federal Power Commission in the course of extensive proceedings, *e.g.*, the safety of the aqueduct and the appearance of the shoreline). Nor does the State have the authority to conduct a further review of alternatives in the context of the TWSD Permit or the CZM Determination, because, again, the State's authority in this area is preempted by the NGA. As to the applicability of cases decided under the Federal Power Act, 16 USC §791a *et seq.* to those governed by the NGA, the Supreme Court has held that similar provisions in the two statutes may be construed in similar fashion. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578n.7 (1981).

[8] See Exhibit A to the DEIS and the FEIS.

binding on the DEP.[9] Absent a stay, the FERC certificate order remains binding and effective even if a petition for rehearing and a judicial appeal is filed under NGA § 19.[10] No stay of the FERC Certificate order has been issued by FERC or any Court, thus the DEP is precluded from reconsideration of project alternative and alignment issues.

Islander East takes this opportunity to note that, notwithstanding FERC's finding that construction of its pipeline facilities along the FERC-certificated route and utilizing the FERC-mandated mitigation measures is environmentally acceptable, Islander East has offered to perform additional mitigation measures beyond those required by FERC in order to meet the expressed concerns of the DEP. Data supporting these additional measures have already been provided to the DEP.

TWSD Permit: It is Islander East's earnest desire to cooperate with the State in applying for and obtaining a TWSD permit, and Islander East has taken every possible step to do so to date. However, it is also Islander East's position that the requirement to obtain a TWSD permit is subject to the preemptive effect of the NGA and the FERC Certificate. A long line of judicial precedent establishes that the NGA and the regulations promulgated by FERC thereunder prevent State and local agencies, through application of State and local laws, from prohibiting or unreasonably delaying the construction or operation of FERC-approved facilities.[11] It is also Islander East's position that the Moratorium, if extended and applied to Islander East, runs afoul of the Commerce Clause of the United States Constitution.

Accordingly, if the DEP elects to deny the permit, to decline to act on it by reason of the Moratorium, or to condition its issuance on payment of an excessive processing fee, Islander East's intention is to proceed under the authority of its federal authorizations.[12]

Conclusion: Time is of the essence with respect to the matters addressed in this letter. This project has already been delayed a full year from its intended schedule. Islander East now must construct its pipeline facilities and place them in operation by November 1, 2004, in order to meet the requirements of the market. This will require Islander East to commence construction by early Fall 2003. Islander East urges the State to cooperate in achieving that schedule, failing which Islander East will pursue its rights and remedies under federal law in order to make that schedule a reality.

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[9] See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-340 (1958), *Williams Natural Gas Co. v. Oklahoma City*, 890 F. 2d 255 (10th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990).

[10] See *e.g., Ecee, Inc. v. FPC*, 526 F. 2d 1270, 1274 (5th Cir.), *cert. denied*, 429 U.S. 867 (1976), *Louisiana v. FPC*, 483 F.2d 972, 973 (5th Cir. 1973).

[11] *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply Corp. v. Public Service Comm'n.*, 894 F.2d 571 (2nd Cir. 1990), *cert. denied*, 110 S. Ct. 3240 (1990).

[12] *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n.*, 894 F.2d 571 (2nd Cir. 1990), *cert. denied*, 110 S.Ct. 3240 (1990).

Notwithstanding that the DEP's request for information concerning project alternatives and alternative routes is beyond the scope of its authority under the Clean Water Act, Islander East is providing herewith for your convenience certain materials relating to alternatives that were submitted to, and evaluated by, FERC in its analysis of alternatives. This material may be considered responsive to paragraphs 1-7 of the Addendum to your letter. Islander East is, in addition, providing herewith the technical responses and data in response to paragraphs 8-28 of the Addendum.

We will contact you shortly to establish a meeting in early June to review our responses with you.

Sincerely,

Gene H. Muhlherr

cc: Cori Rose, U.S. Army Corps of Engineers
Mike Ludwig, National Marine Fisheries Service
David Carey, Department of Agriculture / Bureau of Aquaculture
Joanne Wachholder, Federal Energy Regulatory Commission
Michael Marsh, US Environmental Protection Agency

14. The Department's experience with HDD applications in Connecticut and elsewhere is that there are often complications during construction such as drill hole failure. As you are most likely aware, once this Office authorizes construction techniques for a particular location, the authorization is not applicable to other locations or variations in technique. Therefore, in the event of complete HDD failure, please identify and provide necessary information regarding alternate locations and installation techniques for possible conditional authorization from this Office. If conditional locations and techniques are not approved up-front, significant delays or total project termination could result.

In the event the HDD is unsuccessful, another HDD crossing will be attempted using a new angle on the drill path or another location adjacent to the first attempt. The feasibility of an HDD pipeline installation is largely dependent upon subsurface conditions. A site-specific geotechnical investigation was conducted at the crossing location in order to define the geological characteristics and engineering properties of the subsurface material. Several exploratory borings at multiple locations along the drilled alignment were taken, and soil and rock samples obtained from these borings were taken to a laboratory and tested for various properties such as strength and hardness. These analyses indicate that the HDD method is appropriate and feasible at the proposed location.

In order to minimize the risk inherent in an HDD crossing, Islander East will use a technical team consisting of Islander East representatives, the HDD consultants, and the drilling contractor. The formation of this team well in advance of construction will allow more detailed and advanced construction engineering to be undertaken, and will enhance the prospects for a successful HDD installation by bringing together more resources than those available to any single team member working independently.

There are three basic steps in the HDD process used to install a pipeline crossing. These steps include pilot hole drilling, reaming, and pullback. The discussion that follows addresses the different failure modes, the failure establishment criteria, and the process which Islander East's technical team will use to evaluate potential failure.

Pilot Hole Failure Criteria

During drilling, an HDD attempt will be considered a failure if, after multiple attempts, a pilot hole cannot be established along the proposed drill path. The attempt will be considered a failure after Islander East has determined that the drill can no longer penetrate the existing geological strata along an acceptable path. In the event of pilot hole failure, the unsuccessful pilot hole will be abandoned and filled with drilling mud and cuttings. Islander East will implement reasonable mitigation measures based on the suspected reason for the failure, to increase the chances of success for the second attempt. If these measures are not successful, and failure is encountered during drilling of the second pilot hole, the original pilot hole location and/or trajectory will be modified. This process will continue with all reasonable attempts to successfully complete a pilot hole under the nearshore.

Reaming Failure Criteria

Reaming passes will be considered a failure only after the HDD contractor can no longer expand the pilot hole with the reaming tools, or is unable to maintain a stable opening for the successful installation of the proposed pipeline. The HDD contractor will attempt to retrieve any missing equipment from the hole and attempt to continue the reaming process, prior to deeming the attempt a failure. If the reaming process cannot continue in the existing hole, a new drill path will be assessed and the HDD construction method will begin again.

Pullback Failure Criteria

Islander East will consider an HDD attempt a failure if the pipe cannot be pulled into place beneath the nearshore. If the pipe can be removed, a second effort will be made after the hole has been reopened with additional reaming as determined by Islander East. In this case, a second attempt would be made along a different trajectory to re-drill the crossing and install the pipeline.

In the event that Islander East determines that an alternate location or new installation technique must be utilized for the nearshore crossing, Islander East will seek all required regulatory approvals.